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February 4, 2005

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, 96-98**
***Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92**

Dear Ms. Dortch:

On February 3, 2005, Jonathan Lee of the CompTel/ASCENT Alliance and I met with Jessica Rosenworcel, Legal Advisor to Commissioner Michael J. Copps, to discuss the appropriate regulatory treatment of so-called "virtual FX" or "virtual NXX" arrangements. During this meeting we urged the FCC to reject ILEC arguments that virtual FX traffic should now be treated as "interexchange" traffic subject to access charges, and we distributed the attached diagrams, which are explained below. As numerous other commenters in this proceeding have demonstrated, the ILECs' argument that CLECs should pay access charges for all so-called "virtual NXX" and ISP-bound traffic that travels beyond the local exchange is baseless, as is the claim that the existing rules preclude reciprocal compensation for all types of traffic that originates in one local calling area and terminates in another.

During our meeting, we explained that *all* FX traffic, including so-called virtual FX traffic, has traditionally been rated as toll or non-toll based upon a comparison of the local exchanges with which the dialing and dialed numbers are associated. Specifically, if both numbers are associated with rate centers located within the same local calling area (as defined by the calling party's carrier), the calling party's carrier does not impose a toll charge on the calling party. If the numbers are associated with rate centers located within different local calling areas (as defined by the calling party's carrier), the calling party's carrier imposes a toll charge on the calling party. Consequently, from the calling party's perspective, there is absolutely no difference between calls to telephone numbers associated with FX-type arrangements and any other telephone numbers: the calling party knows immediately whether it will incur a toll charge or not based upon the number being called, regardless of whether that number is associated with an FX-type arrangement or not.

Likewise, from the calling party carrier's perspective, there is absolutely no difference between calls to telephone numbers associated with FX-type arrangements and any other telephone numbers. Each telephone number is associated with a specific rate center, and each rate center is located within a specific local access and transport area ("LATA"). Each telephone number is also associated with a specific carrier.[1] Under the Act and the FCC's rules, CLECs have the right to interconnect with the ILEC at a single point of interconnection ("POI") in each LATA.[2] Accordingly, all traffic originating in a given LATA to be exchanged between the ILEC and a CLEC is exchanged at their POI for that LATA, and each carrier bears the financial responsibility for delivering its own originating traffic to the POI. Once a carrier has delivered its own originated traffic to the POI, however, the other carrier takes complete responsibility for terminating that traffic.

Moreover, once a carrier has delivered its own originated traffic to the POI, it has no practical means for systematically determining the physical termination point of the traffic, or the means by which the traffic is terminated: From the calling party carrier's perspective, all traffic destined for exchange with a particular carrier within a LATA is identical, regardless of whether the traffic is terminated by the terminating carrier to an FX-type arrangement or not. Only the terminating carrier knows the physical location to which, as well as the means by which, a particular call is terminated, including whether the call is terminated via an FX-type arrangement. Consequently, it is not surprising that all FX traffic, including so-called virtual FX traffic, has always been considered non-toll traffic since it is the calling party's carrier – not the

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1 For the sake of simplicity, this explanation assumes that the number has not been ported to another carrier, and thus that no local number portability dip is necessary.

2 *See* 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2). *See also Petition of WorldCom, Inc.,* 17 FCC Rcd 27039, 27064, ¶52 (2002), *citing Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9634, 9650, ¶¶ 72, 112 (2001); *SWBT Texas 271 Order,* 16 FCC Rcd at 18390, ¶78, n.174. In fact, the Commission lacks the authority to impose a reciprocal duty on CLECs with respect to interconnection obligations unless: (1) CLECs "occupy a position in the market for telephone exchange service within an area that is comparable to the position occupied" by the ILEC; (2) CLECs have "substantially replaced" ILECs; and (3) imposing a reciprocal obligation on CLECs is consistent with the public interest and the purposes of Section 251. 47 U.S.C. § 251(h)(2). The Commission has not, and indeed could not, find that these conditions have been met.

called party's carrier – that determines whether a call is toll or not by comparing the dialed and dialing telephone numbers.[3]

We further explained that the Act and the Commission's rules do not classify traffic on the basis of whether it is routed to a telephone number associated with an FX-type arrangement or not. Rather, traffic is classified on the basis of whether it involves "telephone toll service," which is determined by the calling party's carrier,[4] or information access.[5] By definition, FX-type traffic does not involve "telephone toll service" because the entire point of an FX-type arrangement is to permit calling parties to call the FX-type arrangement without incurring toll charges. The calling party's carrier does not impose a separate toll charge for calls to telephone numbers associated with rate centers located within the same local calling area as the calling party's telephone number. Indeed, any attempt by the calling party's carrier to impose toll charges for calls to some telephone numbers associated with a given rate center but not for calls to other telephone numbers associated with the same rate center would amount to unjust and unreasonable discrimination in violation of Section 202(a) of the Act.[6] As such, traffic that

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3 *See, e.g., Application by Verizon Maryland Inc.*, 18 FCC Rcd 5212, ¶ 149 n.595 (2003) ("Traditional FX service . . . occurs when the ILEC connects the subscribing customer . . . to the end office switch in the distant rate center from which the subscriber wishes callers to be able to reach him *without incurring the toll charges*") (emphasis added); Petition for Declaratory Ruling that Tariffs Filed With a State Public Utility Commission Cannot Impose Surcharges on Interstate Private Line Subscribers for Exchange Access, 88 F.C.C.2d 934, ¶3 (1981) ("Foreign exchange (FX) service normally enables a subscriber to place calls to telephones in a 'foreign' (i.e., distant) exchange without paying [ordinary long distance toll service] charges, and enables persons in the foreign exchange area to place calls to the FX subscriber by dialing a local number without paying [ordinary long distance toll service] charges or using operator assistance to make a collect call").

4 With respect to toll free services, the called party agrees that all calls to a given toll free number will be treated as if they were a telephone toll service or blocked. The calling party knows that the called party has agreed to treat the call as a telephone toll service due to the use of the toll free number.

5 Rule 51.701(b)(1) provides that the exchange of "telecommunications traffic" is subject to reciprocal compensation, except when the "telecommunications traffic" is "interstate or intrastate exchange access, information access or exchange service for such access." 47 C.F.R. §51.701(b)(1). The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16). The Act in turn defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. §153(48).

6 47 U.S.C. §202(a).

meets the definition of "telecommunications traffic" and is subject to reciprocal compensation pursuant to Section 251(b)(5)[7] remains telecommunications traffic subject to reciprocal compensation whether it is routed to a telephone number associated with an FX-type arrangement or not.

Although virtual FX traffic to ISPs should remain subject to the terms of the FCC's interim rate plan, virtual FX traffic to other parties should continue to be treated as local traffic subject to reciprocal compensation under Section 251(b)(5).[8] Non-ISP bound virtual FX traffic has always been treated as local traffic, and, contrary to the claims of certain ILECs, does not meet the Act's definition of "exchange access" since it does not involve the origination or termination of "telephone toll service."[9]

Maintenance of the standard industry practice of rating calls based on a comparison of the NPA-NXXs of the calling and called party's numbers is appropriate because so-called virtual FX traffic is indistinguishable from other types of local traffic in the manner in which it is billed to the calling party or handled by the calling party's carrier (*i.e.*, the calling party's carrier incurs no additional costs). The use of an FX-type arrangement, whether by an ILEC or a CLEC, has no effect on the costs that originating carriers incur when their customers call numbers associated with that FX-type arrangement. This is always the case because the distance that an originating carrier must transport any given call is determined by the location of the originating carrier's own customer and the location of the POI, not by the service configuration of the terminating carrier. The respective locations of the POI and the terminating and originating carriers do not change based on the number that the called party has opted to use, and both carriers use the same switches, transport facilities, routing tables and interconnection points to complete the call. Accordingly, the network configuration of both the originating and terminating carriers, and thus the transport costs that the originating carrier incurs, does not vary based on whether the number that the called party has opted to use is associated with the rate center within which the party is located. We distributed the diagram attached as Attachment A further illustrates this point by comparing the transport of a call placed by an ILEC customer to a CLEC FX customer with the transport of a call placed by an ILEC customer to a typical CLEC customer.

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7 47 U.S.C. § 251(b)(5).

8 The FCC's interim rate plan, which makes no distinction between "local" and "non-local" traffic, applies to all ISP-bound traffic.

9 The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16). The Act defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. §153(48).

Like the ILECs, a CLEC also incurs the same costs to provide originating service to its customers when they call numbers from virtual NXX codes as the CLEC incurs when they call numbers from any other NXX code. We distributed the diagram attached as Attachment B to illustrate this point by comparing the transport of a call placed by a CLEC customer to an ILEC FX customer with the transport of a call placed by a CLEC customer to a typical FX customer.

It is also important to note that ILECs and CLECs face the same transport burdens for calls to each other's FX customers. This fact becomes readily apparent when the transport burdens imposed upon an ILEC when its customer calls a CLEC's FX customer is compared with the burden imposed upon a CLEC when its customer calls an ILEC's FX customer, as the diagram attached as Attachment C, which we distributed during the meeting, illustrates.

As we discussed during the meeting, when viewed together, the attached diagrams illustrate that (1) an ILEC's costs are not affected by the location at which a CLEC delivers traffic to its customers, (2) a CLEC's costs are not affected by the location at which an ILEC delivers traffic to its customers, and (3) CLECs and ILECs incur the same costs to provide originating service to their customers when they call numbers associated with FX-type arrangements as they incur when their customers call numbers from any other telephone number.

The diagrams also illustrate that allegations of "theft of service" are much ado about nothing. If CLECs steal service from ILECs by providing FX services, then ILECs likewise are stealing services from CLECs by providing FX services. In reality, however, neither ILECs nor CLECs are stealing services from each other by providing FX services, because FX traffic is indistinguishable from all other traffic that is subject to reciprocal compensation. Although CLEC FX services may affect an ILEC's revenue, the impact is a competitive loss to which the ILEC may respond by adjusting the pricing of its own FX services. Instead, the ILECs merely want to recover lost toll revenues from their competitors rather than from their customers. Accordingly, it is entirely appropriate to maintain the standard industry practice of rating access and non-access traffic by comparing the NPA-NXXs of the calling and called parties rather than introduce unnecessary complexity in an effort to impose above-cost access charges on traditional and so-called "virtual" FX traffic.

Finally, we explained that the claim by certain ILECs that intraLATA calls to FX-type arrangements are identical to toll services apart from the telephone number assigned to the called party is nonsensical. The ILECs base this claim on the assertion that these calls continue to meet the Act's definition of "toll telephone service,"[10] and thus the definition of "exchange access"[11]

10 The Act defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. §153(48).

because "one party to the call – now, the CLEC customer receiving the call, rather than the ILEC customer placing the call – pays 'a separate charge' above and beyond the charges that are imposed on the calling and called party for service within the local calling area."[12] This argument is inconsistent with industry practice and the plain meaning of the Act because it would permit the called party's carrier to determine whether any given call is a "toll telephone service" by whether that carrier chooses to impose a "separate charge" for the call on the called party. Under this interpretation of the Act, calls would be classified as toll telephone service based upon the pricing plan of the called party's carrier, and the calling party's carrier would have no means for knowing whether any given call would involve a toll telephone service. This is not only fundamentally inconsistent with historical industry practice, it would also be infeasible as a practical matter.

In reality, as we explained in the meeting, the calling party's carrier has the sole right to define its local calling areas and establish pricing plans for its customers,[13] and thus only the calling party's carrier has the right to determine whether a particular call involves a toll telephone service. The pricing plan of the called party's carrier is irrelevant to this determination. Accordingly, the calling party knows immediately upon dialing any given number whether he or she will be incurring separate toll charges for that call, and thus whether he or she will be using a "telephone toll service" as defined in the Act. Telecommunications traffic subject to reciprocal compensation or "local calls" are exchanged between the originating carrier and terminating carrier at the POI agreed to by the carriers for the given LATA, and the originating carrier pays reciprocal compensation to the terminating carrier. The calling party pays no separate charge for placing such a call. By contrast, "telephone toll service" calls are delivered from the originating carrier to an interexchange carrier, which then delivers the call to the terminating carrier, and the originating carrier collects originating access charges while the terminating carrier collects terminating access charges. The calling party typically pays a separate charge for placing such a call. As explained above, calls to FX-type arrangements are identical to any other type of local call (*i.e.*, telecommunications traffic subject to reciprocal compensation) from the perspective of the calling party and calling party's carrier, and there is

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11 The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16).

12 "Verizon's Treatment of All Types of Interexchange Calls – Including Virtual NXX Calls – Is Consistent with the Commission's Existing Rules Which Exclude All Such Calls From Reciprocal Compensation and ISP Intercarrier Compensation," attached to Letter from Donna Epps to Marlene Dortch, dated January 7, 2005 ("White Paper"), 6.

13 Although state regulatory authorities typically require ILECs to seek approval for changes to their local calling areas and pricing plans, it is still the ILEC, rather than any other carrier, that determines the local calling area for its own customers.

no reason to depart from traditional industry practice or the definitions in the Act and the Commission's rules simply to impose originating access charges on such calls.

As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceeding, and a copy is being submitted to all FCC personnel who attended the meeting.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Todd D. Daubert
Counsel to CompTel/ASCENT Alliance

cc: Jessica Rosenworcel
Jennifer Manner
Christopher Libertelli
Daniel Gonzalez
Scott Bergmann

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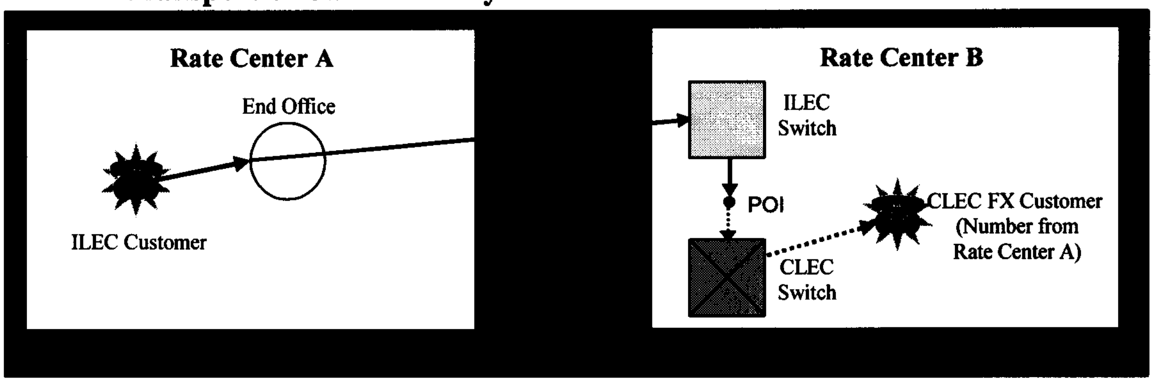
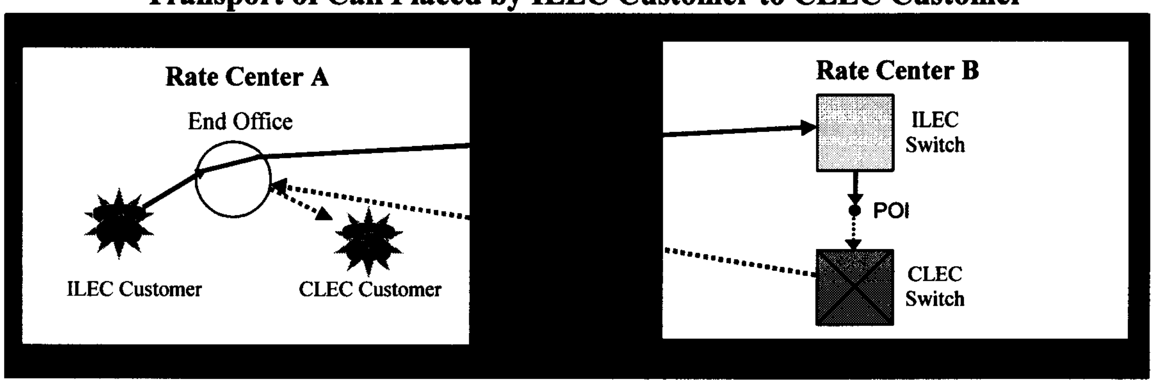
ATTACHMENT A

Transport of Call Placed by ILEC Customer to CLEC FX Customer



Transport of Call Placed by ILEC Customer to CLEC Customer

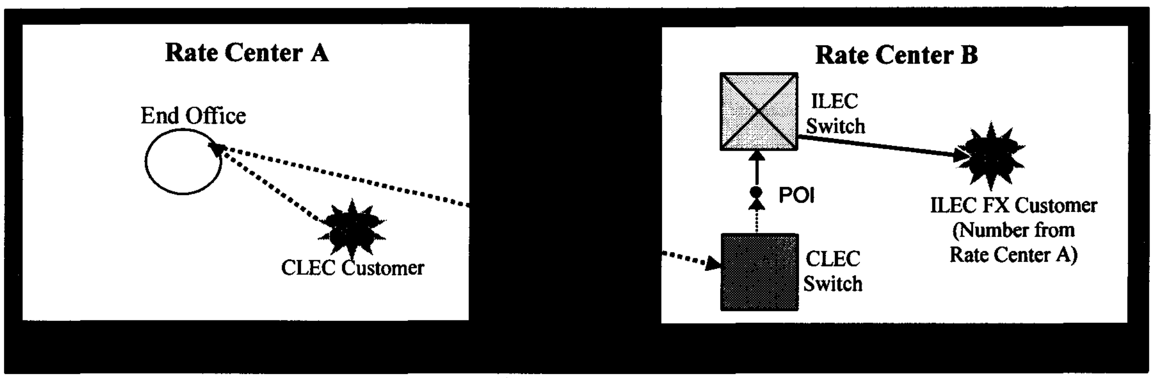


ILEC Transport Burden
CLEC Transport Burden

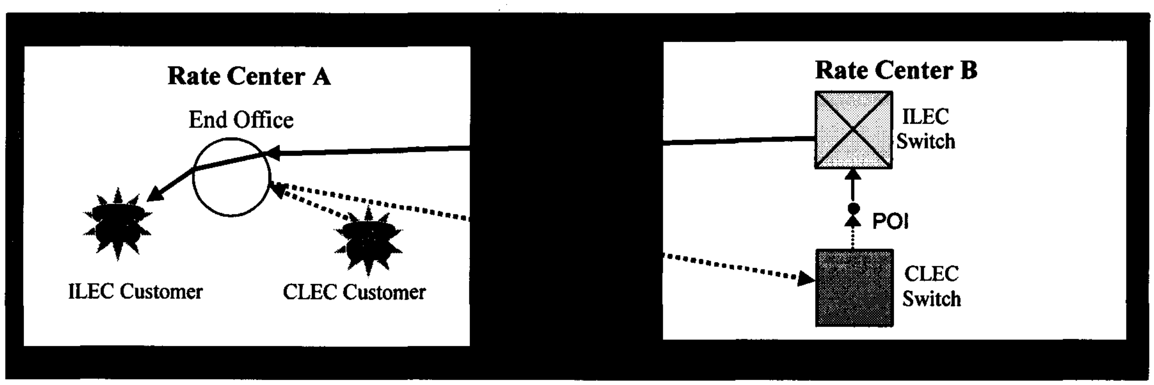
Compensation billed
by terminating party

ATTACHMENT B

Transport of Call Placed by CLEC Customer to ILEC FX Customer



Transport of Call Placed by CLEC Customer to ILEC Customer



ILEC Transport Burden
CLEC Transport Burden

Compensation billed by terminating party

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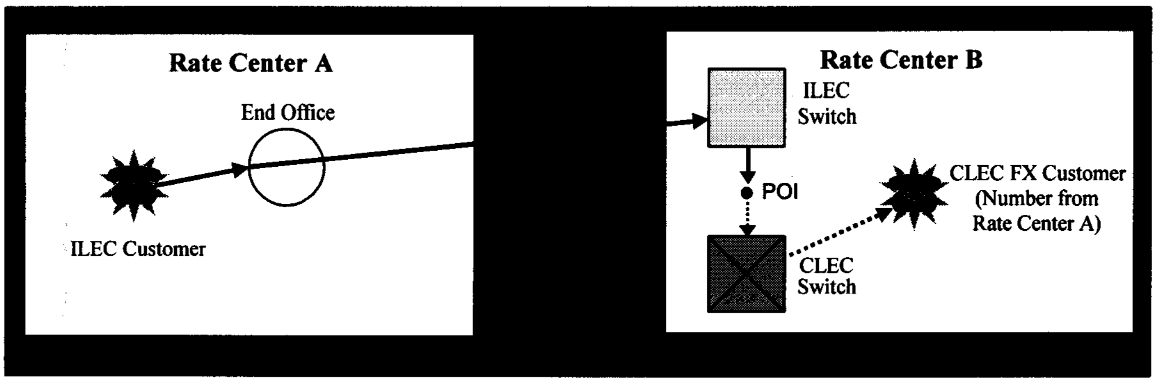
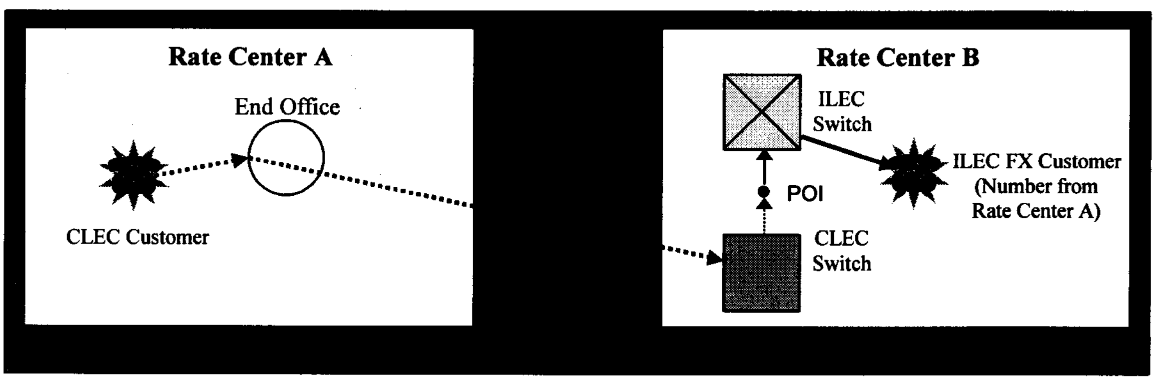
ATTACHMENT C

Transport of Call Placed by ILEC Customer to CLEC FX Customer



Transport of Call Placed by CLEC Customer to ILEC FX Customer



ILEC Transport Burden
CLEC Transport Burden

Compensation billed by terminating party